

**UNITED STATES BANKRUPTCY COURT
MIDDLE DISTRICT OF ALABAMA**

In re

Case No. 04-30500 DHW
Chapter 13

CAROLYN RANDOLPH,

Debtor.

MEMORANDUM OPINION

The chapter 13 trustee filed an objection to confirmation of the chapter 13 plan proposed by the debtor Carolyn Randolph. The trustee contends that the plan was not filed in good faith and is not feasible. An evidentiary hearing on the objection was held May 4, 2004.

Jurisdiction

The court's jurisdiction in this case is derived from 28 U.S.C. § 1334 and the United States District Court for this district's general order of reference of title 11 matters to this court. Further, an objection to confirmation of a plan is a core proceeding under 28 U.S.C. § 157 in which this court's jurisdiction is extended to the entry of final orders and judgments.

Findings of Fact

Carolyn Randolph's husband, Clyde Milton Randolph, is a debtor in another chapter 13 case before this court (Case No. 03-33287). In fact, Clyde Randolph has filed three chapter 13 cases, the last of which is still pending.

Clyde Randolph's first case (No. 01-7245) was filed in November 2001. The confirmed plan provided for payment of the prepetition home mortgage arrearage through the trustee and for payment of the postpetition installments on the home mortgage note directly. The mortgagee filed a proof of claim for prepetition arrearage in the amount of \$6,519.80. The mortgagee also filed a motion for relief from the automatic stay based on a purported default in the postpetition home mortgage payments. The first case was dismissed in September 2002 less than a year after the filing. During the pendency of that case, Clyde Randolph made only 50% of the required plan payments.

According to the debtor and her husband, the first chapter 13 plan failed for two reasons. First, Clyde Randolph lost his job, and second, Carolyn Randolph was diagnosed with cancer for which she underwent treatment which included surgery and chemotherapy.

In October 2002, about one month after the dismissal of the first chapter 13 case, Clyde Randolph filed a second chapter 13 case (No. 02-33081). As in the first case, the plan provided for payment of the prepetition home mortgage arrearage through the chapter 13 trustee and payment of postpetition installments on the home loan note directly to the mortgagee. This time, however, the mortgagee filed a proof of claim for prepetition arrearage totaling \$10,706.09. The case was dismissed in October 2003. At the time of dismissal, Clyde Randolph had made about 66% of the required plan payments.

According to the debtor and her husband, the second chapter 13 case failed because of Clyde Randolph's involvement in a motorcycle accident which resulted in a severe leg injury. As a result of the injury, he was out of work for 10 months.

Within days after the dismissal of the second chapter 13 case, Clyde Randolph filed a third chapter 13 case (No. 03-33287) on October 24, 2003. As in the first two cases, the plan provided for payment of the prepetition home mortgage arrearage through the trustee and for postpetition payments to be made directly to the home mortgagee. This time, the mortgagee filed a prepetition arrearage claim for \$13,060.

The home mortgagee, Principal Residential, filed an objection to confirmation of Clyde Randolph's third plan and further, moved to dismiss his chapter 13 case with a 180-day refiling injunction. Prior to the confirmation hearing, however, Principal Residential withdrew its objection to confirmation and motion to dismiss upon Clyde's agreement to the entry of an order terminating the stay in the event of a default with respect to any future home mortgage payment. The order entered December 18, 2003 (Docket Entry # 18).

Clyde Randolph subsequently defaulted in a payment to the mortgagee. Upon default, Carolyn Randolph, who is a joint owner of the home with Clyde Randolph, filed the case now before the court. The filing of her petition

operated as a stay under 11 U.S.C. § 362(a) preventing Principal Residential from foreclosing on the debtors' home. As with the plans proposed by Clyde, Carolyn's plan proposes to pay the home mortgage arrearage (now \$15,000) through the trustee and to pay future installments directly. At the same time, Clyde filed a motion to modify his chapter 13 plan to transfer the home mortgage arrearage to his wife's case.

Clyde Randolph is employed by Cracker Barrel Restaurant. His net income is approximately \$2,600 per month. His income has not changed since he filed the third chapter 13 case. Carolyn Randolph has for the last year received social security disability income of \$900 each month. Clyde Randolph did not disclose his wife's disability income in his third case.

In his current case, Clyde has a 77% pay record. That is, Clyde has paid 77% of the payments due to the chapter 13 trustee. In her chapter 13 case, Carolyn Randolph has a 67% pay record according to the trustee.

Conclusions of Law

In order to be confirmed the law provides that the plan must have been proposed in good faith. The Bankruptcy Code requires the court to confirm a plan if, *inter alia*, "the plan has been proposed in good faith and not by any means forbidden by law." 11 U.S.C. § 1325(a)(3). In addition, the plan must be feasible.¹

Good Faith Objection

The term "good faith" is not particularly defined by the Bankruptcy Code. The Eleventh Circuit Court of Appeals, however, has held that good faith is to be determined from the totality of the circumstances in a particular case giving consideration to a nonexhaustive list of factors. See *Kitchens v. Georgia Railroad Bank and Trust Company (In re Kitchens)*, 702 F.2d 885 (11th Cir.

¹ The court "shall confirm the plan if . . . the debtor will be able to make all payments under the plan and to comply with the plan." 11 U.S.C. § 1326(a)(6).

1983).²

Under the totality-of-the-circumstances standard, the court must consider not only Carolyn Randolph's case but also the three chapter 13 cases filed by her husband.³ Clyde Randolph committed to three plans in as many years. Each plan provided for the curing of the home mortgage arrearage and the maintenance of postpetition home mortgage payments. He failed on each occasion to accomplish that commitment. Moreover, with each successive failure the home mortgage default grew larger and larger.⁴

By way of mitigation, Carolyn Randolph contends that her husband's chapter 13 plans have failed due to circumstances beyond their control. There

² The so-called *Kitchens* factors are:

- (1) the amount of the debtor's income from all sources;
- (2) the living expenses of the debtor and his dependents;
- (3) the amount of attorney's fees;
- (4) the probable or expected duration of the debtor's Chapter 13 plan;
- (5) the motivations of the debtor and his sincerity in seeking relief under the provisions of Chapter 13;
- (6) the debtor's degree of effort;
- (7) the debtor's ability to earn and the likelihood of fluctuation in his earnings;
- (8) special circumstances such as inordinate medical expense;
- (9) the frequency with which the debtor has sought relief under the Bankruptcy Reform Act and its predecessors;
- (10) the circumstances under which the debtor has contracted his debts and his demonstrated bona fides, or lack of same, in dealings with his creditors;
- (11) the burden which the plan's administration would place on the trustee;
- (12) the extent to which the debtor proposes to modify claims; and
- (13) the extent of the repayment of the unsecured claims.

In re Kitchens, supra at 888-89.

³ The cases of these two debtors are inexorably connected because they jointly own their home. Though Clyde Randolph consented to termination of the stay on any future home mortgage default, Carolyn Randolph effectively reinstated that stay by filing a chapter 13 petition.

⁴ The prepetition arrearage in the first case was \$6,519.80. That amount doubled to \$13,060 by the time Randolph filed his third chapter 13 case.

can be little doubt that her serious illness, her husband's injury, and her husband's job loss contributed to the failure of Clyde Randolph's first two chapter 13 cases. The court is sympathetic to these debtors' plight particularly as to the first two chapter 13 cases.

However, there are no mitigating circumstances offered for Clyde Randolph's default in his home direct mortgage payment in the third and pending case. Since Clyde Randolph filed the third case in October of 2003, the debtors' incomes have not changed. Clyde has worked at a local restaurant, and Carolyn has received social security disability throughout the pendency of the case. Further, the extraordinary expenses associated with Carolyn Randolph's illness and her husband's leg injury had come to an end by the time her husband's third case was filed. In short, the court cannot find that Clyde Randolph's payment default to the home mortgagee in his third case was due to circumstances beyond his control.

Accordingly, the court finds that Carolyn Randolph's plan is not filed in good faith in that it seeks to reimpose the automatic stay as to the home mortgagee, Principal Residential. The court will, nevertheless, confirm the debtor's plan over the trustee's objection with the proviso that the automatic stay does not impede Principal Residential Mortgage Company from foreclosing on the debtor's home. The mortgagee may, however, elect to forgo foreclosure and participate in this case by filing a proof of claim for the arrearage.

Feasibility Objection

The trustee contends that the debtor's plan is not feasible. In support of this contention, the trustee offered evidence that the debtor's pay record in this case, as of the time of the confirmation hearing, was only 67%. Without more, however, the court cannot conclude that the plan is not feasible.

Chapter 13 debtors have thirty days to commence making chapter 13 plan payments. The Bankruptcy Code provides: "(a)(1) Unless the court orders otherwise, the debtor shall commence making the payments proposed by a plan within 30 days after the plan is filed." 11 U.S.C. § 1326(a)(1).

The trustee's computer system calculates the debtor's pay record from the

time the case is filed and not from 30 days after the plan is filed. Therefore, that the debtor's pay record is only 67% in a preconfirmation chapter 13 case may not be indicative of infeasibility.

In fact, the debtor has a 100% pay record in this case. The debtor filed the case on February 20, 2004. The debtor proffered a plan fixing payments to the trustee at \$369 per month. The debtor's first payment was due on March 20, 2004. The debtor paid \$369 on February 25, 2004 and \$369 on April 13, 2004. The debtor's next payment is not due until around May 20, 2004. The debtor amended the plan on April 30, 2004 increasing the payments to \$599 per month. Therefore, the May payment will be due in the increased amount of \$599.

Without other evidence, the court cannot find that the debtor cannot make the plan payments as they come due, and the trustee's objection on this ground is due to be overruled.

Conclusion

For the reasons stated herein, the court finds that the trustee's objection to confirmation of the plan is sustained in part and overruled in part. The debtor's plan will be confirmed but with the proviso that the automatic stay does not prevent the home mortgagee, Principal Residential Mortgage Company, from the *in rem* enforcement of its mortgage on the debtor's realty.

Pursuant to Fed. R. Bankr. Proc. 9021, an order consistent with this memorandum opinion will enter separately.

Done this 5th day of May, 2004.



Dwight H. Williams, Jr.
United States Bankruptcy Judge

c: Debtor

Terry L. Danford, Attorney for Debtor

Susannah R. Walker, Attorney for Principal Residential

Curtis C. Reding, Trustee